Public Prosecutor v Mohamed Ezam bin Mohd Nor

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–06 OF 2001
ABDUL WAHAB PATAIL J
10 APRIL 2001

Criminal Procedure *— Judge — Self-disqualification by — Fear of bias — Criminal judge was brother of head of prosecution who signed charge of accused — Parties did not object to judge hearing the case — Public perception of absence of impartiality — Test to be applied — Whether judge should recuse himself*

The accused was charged under s 4 of the Sedition Act. On the mention date to set down the dates for trial, counsel for the accused informed the court that he wished to make a preliminary objection on the charge. At that point the judge had brought to the attention of counsel that the head of prosecution, Datuk Abdul Gani Patail — the judge's brother — had signed the charge and suggested that therefore it may be improper for the judge to hear submissions in objection upon a charge signed by him. Neither counsel nor the deputy public prosecutor had objected to the judge hearing the objection counsel wished to raise. However the deputy public prosecutor informed the court of the issue of public perception of absence of impartiality if the judge should hear the case.

Held:

(1) The court had satisfied itself that its concern was not founded as an excuse to avoid hearing the objection and the trial. There is an established tradition that notwithstanding that judges were appointed from the Attorney General Chambers, they act independently and impartially. No favour, preference or bias is expected or given. Nothing that the court had heard in extensive submissions suggest even remotely anything personal between the head of prosecution and the accused such that the judge may favour him and decide in this case upon other than its factual merits (see pp 44H–45A).

(2) There was no real danger of bias. There was no common objective between the head of prosecution and the presiding judge, be it arising out of relationship or any common view with regard to prosecution generally, or the prosecution of the accused in particular, or of any party. The court had no reason to believe that Datuk Abdul Gani Patail's action in the prosecution of the accused was personal or that it was other than in the carrying out of his public duties as the head of prosecution (see p 48A–B).

(3) From the mere fact of relationship without more, a fair minded and informed member of the public would not think that in all the circumstances in this case there was a real danger of bias on the part of the judge. The fact of mere relationship alone cannot be a basis of disqualification, but it must be disclosed and inquired

into. On the other hand that does not stop members of the public from entertaining an apprehension or suspicion of bias even unreasonably or even if there was none (see p 48C–D).

(4) Given that the deputy public prosecutor had informed the court that in view of the nature of this case, and the public interest raised particularly in view of the issues involved, the head of prosecution would have an active supervision of the conduct of the prosecution, and applying the wider test, the judge concluded that if objection were taken by the accused he ought to recuse himself (see p 50A–C).

(5) This case was simply and squarely upon the issue of the apprehension in the public mind of an absence of impartiality arising from the mere fact of relationship. Although the court was grateful in the vote of confidence in the parties not having any objections, the court would not expend or use up that confidence, for then it would diminish. The greater interest in maintaining and building upon confidence in the impartiality and independence of the judiciary must always take precedence over the pride of a judge and he must recuse himself (see pp 45A, 51D–E).

[**Bahasa Malaysia summary**

Tertuduh dituduh di bawah s 4 Akta Hasutan. Pada tarikh sebutan untuk menetapkan tarikh perbicaraan peguam bagi pihak tertuduh telah memberitahu mahkamah bahawa beliau ingin membuat bantahan awal ke atas pertuduhan tersebut. Pada ketika itu, hakim telah memberitahu peguam bahawa ketua pendakwaan, Datuk Abdul Gani Patail — adik hakim tersebut — telah menandatangani pertuduhan tersebut dan telah mencadangkan bahawa ia mungkin tidak wajar bagi hakim untuk mendengar penghujahan bantahan ke atas pertuduhan yang ditandatangani oleh Datuk Abdul Gani Patail. Tiada bantahan daripada peguam ataupun timbalan pendakwa raya terhadap hakim mendengar bantahan peguam tersebut. Walau bagaimanapun, timbalan pendakwa raya telah memberitahu mahkamah mengenai isu pendapat awam bahawa mahkamah bertindak secara berat sebelah jikalau hakim mendengar kes tersebut.

Diputuskan:

(1) Mahkamah telah berpuas hati bahawa kebimbangan mahkamah bukan merupakan alasan untuk mengelak daripada mendengar bantahan dan perbicaraan tersebut. Terdapat tradisi yang mantap bahawa walaupun hakim-hakim dilantik dari Jabatan Peguam Negara, mereka menjalankan tugas mereka secara bebas dan saksama. Tiada pilih kasih, keutamaan ataupun berat sebelah yang diharapkan atau diberi. Tiada apa-apa yang telah didengari oleh mahkamah di dalam penghujahan yang mencadangkan bahawa terdapat kaitan di antara ketua pendakwaan dan tertuduh

yang boleh menyebabkan hakim menyokongnya dan membuat keputusan kes ini berdasarkan perkara lain daripada merit (lihat ms 44H–45A).

(2) Tidak terdapat kemungkinan sebenar berat sebelah. Tidak terdapat apa-apa objektif yang sama di antara ketua pendakwaan dengan hakim yang bersidang, sama ada yang tertimbul dari tali persaudaraan mereka ataupun pandangan yang sama mengenai pendakwaan secara amnya, ataupun pendakwaan tertuduh khususnya, ataupun pendakwaan sesiapapun. Mahkamah tidak mempunyai alasan untuk percaya bahawa tindakan Datuk Abdul Gani Patail dalam pendakwaan tertuduh adalah peribadi ataupun merupakan sesuatu yang lain daripada menjalankan tugasnya sebagai ketua pendakwaan (lihat ms 48A–B).

(3) Hanya berdasarkan tali persaudaraan, orang awam yang berfikiran waras dan berpengetahuan tidak akan berpendapat bahawa, dalam semua keadaan kes ini, terdapat kemingkinan besar yang hakim akan berat sebelah. Fakta tali persaudaraan sahaja tidak boleh menjadi dasar untuk penyingkiran, tetapi ia mesti didedahkan dan disiasat. Walau bagaimanapun, ini tidak menjadi halangan kepada orang awam daripada mensyaki berat sebelah walaupun secara tidak munasabah ataupun tiada berat sebelah langsung (lihat ms 48C–D).

(4) Memandangkan timbalan pendakwa raya telah memberitahu mahkamah bahawa kerana sifat kes ini, kepentingan awam yang telah dibangkitkan oleh sebab isu-isu yang terlibat, ketua pendakwaan mempunyai penyeliaan yang aktif dalam pengendalian pendakwaan, dan dengan menggunakan ujian yang lebih luas, hakim telah memutuskan bahawa jikalau bantahan tersebut diambil oleh tertuduh, beliau sepatutnya mengundurkan diri (lihat ms 50A–C).

(5) Kes ini adalah mengenai isu kekhuatiran di kalangan orang awam mengenai ketiadaan keadilan semata-mata kerana tali persaudaraan. Walaupun mahkamah menyenangi keyakinan pihak-pihak kerana tidak membantah, mahkamah tidak akan menyalahgunakan keyakinan tersebut. Kepentingan mengekalkan dan membangunkan keyakinan dalam keadilan dan kebebasan kehakiman mestilah selalu melebihi maruah seorang hakim dan beliau mesti mengundurkan diri (lihat ms 45A, 51D–E).]

Notes

For cases on self-disqualification by a judge, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1594–1599.

Cases referred to

Bradford v McLeod [1986] SLT 244 (refd)
Cheak Yoke Thong v PP [1984] 2 MLJ 119 (refd)

Dato Seri Anwar bin Ibrahim v Ketua Polis Negara Permohonan Jenayah No 44–103–98, Mahkamah Tinggi Jenayah Kuala Lumpur (unreported) (refd)
Dimes v The Proprietors of the Grand Junction Canal (1852) 3 HL Cas 759, 10 ER 301 (refd)
Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group [2000] HCA 63 (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507 (refd)
Hobbs v Tinling [1929] 2 KB 1 (refd)
Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213 (refd)
Kartinyeri v The Commonwealth [1998] HCA 52 (refd)
Livesey v New South Wales Bar Association (1983) 151 CLR 288 (refd)
Locabail (UK) Ltd v Bayfield Properties Ltd & Anor and other appeals [2000] 1 All ER 65; [2000] 2 WLR 870 (refd)
Maleb bin Su v PP; Cheak Yoke Thign v PP [1984] 1 MLJ 31 (refd)
Pinochet (No 2), Re [1999] 2 WLR 272; [1999] 1 All ER 577 (refd)
R v Bow Street Magistrate; ex p Pinochet Ugarte (No 2) [2000] 1 AC 119 (refd)
R v Sussex Justices; ex p McCarthy [1924] 1 KB 256 (refd)
Raja Segaran a/l Krishnan v Bar Malaysia & Ors [2000] 4 MLJ 571 (refd)
Raphael Pura v Insas Bhd & Anor [2001] 1 MLJ 49 (refd)
Reg v Gough [1993] AC 646 (refd)
Reg v Simpson; ex p Morrison (1984) 154 CLR 101 (refd)
Reg v Watson; ex p Armstrong (1976) 136 CLR 248 (refd)
Tang Liang Hong v Lee Kuan Yew & Anor and other appeals [1998] 1 SLR 97 (refd)
Wakefield Board of Health v West Riding and Grimsby Ry Co 6 B & S 794 (refd)
Webb v The Queen (1994) 181 CLR 41 (refd)

Legislation referred to

Criminal Procedure Code s 418A

Appeal from: Sessions Court Arrest Case No 2–62–23 of 2001 (Sessions Court, Kuala Lumpur)

Abdul Karim bin Abdul Jalil (Attorney General's Chambers) for the Public Prosecutor.

Zainur Zakaria (*Zainur Zakaria & Co*) for the accused.

Abdul Wahab Patail J:. The charge against Mohamed Ezam bin Mohd Nor ('the accused') under s 4 of the Seditions Act ('the Act') for uttering words having a seditious tendency was transferred to the High Court under s 418A of the Criminal Procedure Code. The case was mentioned before me on 21 March 2001 when the charge was read to the accused who claimed to be tried.

On the mention date to set down the dates for trial, counsel for the accused informed the court that he wished to make a preliminary objection on behalf of the accused. When asked the nature of the preliminary objection, the court was informed that the objection was on the charge itself.

At that point, I had brought to the attention of the learned counsel that Datuk Abdul Gani Patail signed the charge, disclosed that he is my brother, and suggested that therefore it may be improper for me to hear submissions in objection upon a charge signed by him. In all humility, I was gratified by the assurance of counsel that he and the accused had no objections. Nevertheless, I had reservations as to the propriety and I was reluctant to proceed with hearing of the preliminary objections. I told counsel to discuss the matter first with his colleagues, then with the accused and also with the deputy public prosecutor. The purpose was to give counsel and his colleagues the opportunity to review the relevant case law guiding us on this issue, and then armed with that knowledge, to advise the accused and obtain his instructions. If his instructions were to waive the possible objection, counsel should then discuss with the learned deputy public prosecutor to ascertain the actual involvement of Datuk Abdul Gani Patail. I would only be prepared to consider hearing the objection and the trial after having heard further submissions from the parties.

On 2 April 2001, counsel for the accused assured the court that the accused had no objections. On the other hand, the prosecution informed the court that having had the opportunity to consider the reservations of the court, it agreed that it would be prudent that a different judge hear the trial. The court was informed that since it is a case of much public interest, as the head of prosecution, Datuk Abdul Gani Patail was directly involved in supervising the conduct of prosecution. The learned deputy public prosecutor was kind to assure me the position taken was not a reflection upon the ability of the court to hear the case impartially, but arises out of concern as to the public perception of absence of impartiality if I should hear the case.

On the other hand, Mr Christopher Fernando was concerned that should I recuse myself on these grounds, it would open the floodgates of objection in other cases on similar grounds and it would mean that I would have to inquire before every criminal trial as to the involvement of Datuk Abdul Gani Patail before proceeding with the trial. He asked for time to prepare submissions. The application was granted. Submissions were heard on 6 April 2001, and I had reserved judgment to be delivered on 10 April 2001.

One of the most tormenting criticisms a judge may hear against himself is criticism based not upon the issue of correctness of his decision in fact and in law, but upon grounds outside of the merits of the case. No judge seeks such criticism. One such example is upon the general ground of bias, actual or the appearance of it. It strikes at the very root of the principle of impartiality and independence of the judge, and leads to the accusation that the decision is not fair and just.

A Bias implies pre-judgment and negates the fundamental requirement of a fair and independent trial. The reluctance on the part of and objection to a judge to hear a case in which he may be seen to be biased has its origins in that principle of impartiality and independence that is ingrained in our concept of justice. Impartiality and independence is essential more so because it is a matter of opinion. Members of a lynching mob regard their B actions as just, although clearly to others it is not. It is also clear that justice at the end of the day is what right thinking people accept as just. The perception that justice has been done requires acceptance that the trial is fair. *R v Sussex Justices; ex p McCarthy* [1924] 1 KB 256 at p 259, per Lord Hewart CJ is most often cited, but see *Hobbs v Tinling* [1929] 2 KB 1 at p 48, for a statement of the basic principle that 'justice should not only be C done, but should manifestly and undoubtedly be seen to be done'. What this really involves is worthy of examination.

That justice is done is as well guaranteed as can be by the fact that decisions of a judge of the High Court may be appealed to the Court of Appeal and the Federal Court, comprised three judges sitting together, and D in the latter court, by more than three judges as the occasion may require. Indeed, it would be apparent that there is adequate provision to ensure that any error or injustice that is occasioned by actual bias or pre-judgment could be remedied. In *Re Pinochet (No 2)* [1999] 2 WLR 272; [1999] 1 All ER 577; *R v Bow Street Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC E 119 gives confidence that an error in a final court of appeal, hitherto thought to be uncorrectable except by legislation, could also be corrected.

That justice is also seen to be done carries a meaning not apparent at first glance.

Actual bias is extremely rare. It is a very serious allegation to make and not easy to substantiate. F

The appearance of bias causes an apprehension of bias. The accusation of appearance of bias is easier to make. It does not require actual bias to be shown. It is founded upon opinion whether there is or is not the appearance of bias. Once it arises, and being in the public domain rather than in the structured examination, reasoning and consideration process in a court of G law, the debate may never end. Even if there is no actual bias, it is just as undesirable as actual bias in the administration of justice in that it will perennially raise questions whether its decisions are actually on merits. Such doubts are damaging. It draws the court and the administration of justice away from above the dispute where it ought to be, into the dispute to defend itself. It embarasses the judge, and rightly or wrongly is beside the H point, it debases the public image of the administration of justice. Justice having in fact been done alone has proved to be insufficient to allay doubts where there is the appearance of bias.

But there are those who argue that even so justice is seen to be done when errors and injustice are actually corrected, in an appellate process.

I In my view, it goes beyond that limited argument. That one who is actually biased should hear a case is so totally abhorrent to our sense of justice, that the apprehension of bias or prejudgment arising from the

appearance of bias itself is a matter rightfully of concern. We should not give occasion for it to arise and linger in our minds even in the first instance and requiring to be corrected later. Public confidence in the administration of justice is justifiably shaken when there are questions as to the integrity of the judiciary at any stage of the judicial process. Whether the allegation of bias is warranted or not, absence of public confidence certainly undermines the integrity of the decision by the court and by extension, the administration of justice, even if there were no actual bias or pre-judgment. Thus, it was held in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 by the Court of Appeal that unfounded and unwarranted allegations of bias ought to be avoided, and may if necessary be punished by resort to the power to punish for contempt:

> In my judgment, it is a most serious matter to allege bias against a Judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the State than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

The appearance of bias may arise in many ways. Deane J in *Webb v The Queen* (1994) 181 CLR 41 at para 12 in the High Court of Australia sought to categorize the instances in the following four, although not necessarily distinct categories:

(a) Interest. This involves recusing oneself from cases in which one has direct or indirect interest, pecuniary or otherwise. This principle is long established. It is extremely unjust that any one should be judged in his own cause (*In repropri iniquum admodum est alicui licentiam tribuere sententiae*). In *London and North-Western Railway Co v Lindsay* (1858) 3 Macq 99, Lord Wensleydale stated that, as he was a shareholder in the appellant company, he proposed to retire and take no further part in the proceedings. In *Sellar v Highland Railway Co* (1919) SC (HL) 19, Lord Buckmaster held as to the holding of some shares by one of the arbiters requires disclosure:

> 'The law remains unaltered and unvarying today, and, although it is obvious that the extended growth of personal property and the wide distribution of interests in vast commercial concerns may render the application of the rule increasingly irksome, it is none the less a rule which I, for my part, should greatly regret to see even in the slightest degree, relaxed. *The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured.* In practice also the difficulty is one easily overcome, because, directly the fact is stated, it is common practice that counsel on each side agree that the existence of the disqualification shall afford no objection to the prosecution of the suit, and the matter proceeds in the ordinary way, but, if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and may be set aside.' (Emphasis added.)

(b) Conduct, including published statements (see (1994) 122 ALR 41; (1994) 68 ALJR 582; *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213; *Bradford v McLeod* [1986] SLT 244; *Doherty v McGlennan* [1997] SLT 444; *Vakauta v Kelly* (1989) 167 CLR 568). This category consists of cases in which conduct of the judge, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias if not showing actual bias. It raises a clear apprehension of bias or pre-judgment.

(c) Association (see *Re Pinochet (No 2)*). This refers to those instances where some direct or indirect relationship, experience or contact with a person or persons involved in or interested in the proceedings raises the apprehension of pre-judgment or other bias.

(d) Extraneous information (see *Vakauta v Kelly* (1989) 167 CLR 568; *PP v Lau Tuck Weng & Anor* [1988] 3 MLJ 217). This refers to cases where knowledge of some prejudicial but inadmissible fact or circumstance, for example from having heard another case related to it, gives rise to the apprehension of bias.

The question I have raised, that is of relationship, falls in the third category. Let me hasten to make it clear that neither counsel nor the learned deputy public prosecutor had objected to me hearing the objection the learned counsel wished to raise. In *Dato Seri Anwar bin Ibrahim v Ketua Polis Negara* Permohonan Jenayah No 44–103–98, Mahkamah Tinggi Jenayah Kuala Lumpur (unreported) I had, in rejecting a surprise objection in open court, set out when and how the objection is properly raised:

> Good advocacy also requires parties to act with civility and discretion, avoiding actions merely sensational, so that we can focus our attention to determining what is the truth in the case.
>
> For this reason, I have sought to have the elementary facts established. The rules or practise pertaining to a judge disqualifying himself are quite established.
>
> Firstly, if he is aware of relationship — whether relative, close friend or partner, or where he has a conflict of interest — these are matters known to him and the other party before him may not necessarily know of it, he is duty bound to disclose it.
>
> Secondly, where he is not aware, but a party knows of such possible relationship or conflict, he brings it to the attention of the judge.
>
> A judge cannot necessarily know of such possible conflict from perusing the documents. I am after all, not my brother's keeper.
>
> The usual practice is for a party knowing of such possible conflict, even though not necessarily intending to object, to request to see the judge in the presence of the other party in chambers.
>
> If the party disagrees with the judge's intention not to disqualify himself, then only the matter is raised in open court, and the Judge will make a ruling upon it; and which like all rulings, may be the subject of appeal if the party is dissatisfied with it.

It would be stretching things to say that Datuk Abdul Gani Patail has a pecuniary interest in this case. On the other hand, he is the head of prosecution in the Attorney General's Chambers of the department that has

deals with prosecutions. In expressing his concern that if I recuse myself in this case, I would set a precedent that will open the floodgates of objection to my hearing any criminal case, learned counsel Mr Christopher Fernando is in effect recognizing very fairly that in view of the large number of cases, any 'interest' as on his part as head of prosecution is purely professional and incidental, and no reasonable person would entertain any doubt. I accept that generally that is true.

Upon reflection, I find that it is not so simple. The concern is about the apprehension of absence of impartiality and independence of the judge, not the head of prosecution. There are those cases by the nature of which he may be duty bound, although not appearing personally as the prosecutor, to be active in advising upon the conduct of its prosecution. Where he has signed the charge, it is in the least probable he has more than an incidental or passing interest. The concern is that the judge, knowing that his brother has more than a purely incidental or passing interest, may not be impartial or independent even if his brother has taken the utmost care not to have even mentioned the case to the judge. It behooves me to be on notice, and in cases where I suspect Datuk Abdul Gani Patail may have more than a passing or incidental interest, not merely to disclose the fact of relationship, to inquire into his involvement by giving the parties the opportunity to prepare and address me on the matter, as I had done in this case. To borrow the words of Lord Buckmaster, it is a 'small inconvenience' experienced in the preservation of the administration of justice, which 'may be cheerfully endured'.

This much is absolutely clear: if Datuk Abdul Gani Patail should appear and prosecute in my court as a prosecutor, I will recuse myself; if he should be a witness in a trial before me, I ought to be informed by the party intending to call him as a witness, and having notice I will recuse myself. If it is a matter in which he has any pecuniary or other interest and I am given notice by counsel or through the deputy public prosecutor, I would recuse myself. In this case, Datuk Abdul Gani Patail had signed the charge. That is enough to put me on notice to inquire into his involvement. I had brought that to counsel's attention, disclosed the relationship and given the parties time to inquire and submit thereon.

I have earlier explained above that bias and the apprehension of its existence are issues of fundamental importance and not to be taken lightly. Deane J in *Webb v The Queen*:

> That point was well made by Barwick CJ, Gibbs, Stephen and Mason JJ in their joint judgment in Watson ((1976) 136 CLR at pp 262–263):
>
> > '… his (ie Lord Hewart's) statement of principle, which was recently reaffirmed in this Court in *Stollery v Greyhound Racing Control Board* ((1972) 128 CLR at pp 518–519) does go to the heart of the matter. *It is of fundamental importance that the public should have confidence in the administration of justice. If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision*. To repeat the words of Lord Denning MR which have already been cited, '*Justice must be rooted in confidence: and confidence is destroyed*

> *when right-minded people go away thinking: 'The judge was biased'.'* (Emphasis added.)

The purpose of the disqualification is to preserve the administration of justice from any suspicion, be it of absence of impartiality or of pre-judgment. In apprehension of bias or pre-judgment, we are dealing with issues involving likelihood of bias and pre-judgment. The question that begs consideration next is what test is to be applied.

The importance of these tests as to the necessary level of likelihood to be shown is, as explained by Lord Woolf in *Reg v Gough* [1993] AC 646 at p 673, to avoid the quashing of convictions upon quite insubstantial grounds on the flimsiest pretext of bias. Equally, it is also to avoid objections on the flimsiest of pretext, and judges themselves from avoiding to hear cases before them on flimsy pretexts. In *Dato' Seri Anwar bin Ibrahim v Ketua Polis Negara*, I had stated:

> A judge has very clear responsibilities. It would be irresponsible to discharge himself on frivolous grounds, since he would be shirking his duties, and transferring his burden upon other judges.
>
> Furthermore, disqualifications if lightly taken, facilitate picking and choosing of judges to hear cases.

In *Raja Segaran a/l Krishnan v Bar Malaysia & Ors* [2000] 4 MLJ 571, an objection by the Bar that the judge should disqualify himself was made on the grounds the judge has a son who is a member of the Bar. With respect, if the son is a member of the Bar, more likely the bias would have been in favour of the Bar rather than the plaintiff. It would be the plaintiff then who has more reason for apprehension, and it would appear he had waived it by not objecting. In the absence of any suggestion his son shares similar interest, conduct or associates with the plaintiff, the mere fact the son is a member of the Bar is too remote for consideration of an objection by the Bar, particularly, if the nature of the objection is to suggest he does not share the views of the Bar.

In *Ebner v The Official Trustee in Bankruptcy*; *Clenae Pty Ltd v ANZ Banking Group* [2000] HCA 63, Gleeson CJ, McHugh, Gummow and Hayne JJ in the High Court of Australia had this to say:

> 20 This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. *However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.* (Emphasis added.)

The point being made is that other than in cases involving personal interest of the judge in the outcome of the trial, the objection of bias per se is not sufficient upon the superficial fact relied on, but the objection must be reasoned and must explain why and how the apprehension of bias arises. It

is in this sense that substantiation is understood in the requirement that the accusation, if made, must be substantiated.

The case of *Kartinyeri v The Commonwealth* [1998] HCA 52 would seem to provide some support for the argument by counsel for the accused in suggesting I should not recuse myself. In that case Callinan J said, in concluding his judgment for the High Court of Australia, in which the plaintiffs objected to him sitting as a judge:

> 37 One other case should be mentioned. In *Re Polites; ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 at 87–88, Brennan, Gaudron and McHugh JJ said this:
>
> > 'A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. A fortiori, if the advice has gone beyond an exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the erstwhile legal adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate. If the erstwhile legal adviser were to sit in a proceeding in which the quality of his or her advice is in issue, there would be reasonable grounds for apprehending that he or she might not bring an impartial and unprejudiced mind to the resolution of the issue. Much depends on the nature of his or her relationship with the client, the ambit of the advice given and the issues falling for determination.'
>
> 38 In the end, I have to decide whether all of the circumstances give rise to a reasonable apprehension that I might not bring an impartial and unprejudiced mind to the resolution of the question in issue. Abstention from sitting in this case, which, whatever the outcome, is bound to excite criticism and controversy, has much appeal. However, I must do my duty without reference to any such consideration. Taking all of the factors into account, and accepting for present purposes that there is no exceptional principle applicable to constitutional cases (a principle which I take as not having been firmly established) I have concluded that I should not disqualify myself. The most important factors are that there were no issues of fact or credibility involved in any advice that I gave, that the issues in this case are exclusively legal ones and, that I played no part at all in drafting, advocating or in any way implementing the legislation that the court has to consider.

I have satisfied myself that my concern is not founded as an excuse to avoid hearing the objection and the trial. Judges hear cases every day and it does not matter to him which or what that case is. There is an established tradition that notwithstanding that judges were appointed from the Attorney General's Chambers, they act independently and impartially. No favour, preference or bias is expected or given. Nothing that I have heard in extensive submissions suggests even remotely anything personal between

A the head of prosecution and the accused such that I may favour him and decide in this case upon other than its factual merits.

This case is therefore simply and squarely upon the issue of the apprehension in the public mind of absence of impartiality arising from the mere fact of relationship. Having that firmly in mind helps greatly in the B consideration of the tests that has been expressed in various cases.

The test applied the England in *Reg v Gough* was whether there was a real danger of bias. Suspicion or even reasonable suspicion is not enough. The test, formulated by Lord Goff at p 670 is as follows:

> C [H]aving ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration.

In Malaysia, Hashim Yeop Sani FJ (as he then was), in *Maleb bin Su v PP; Cheak Yoke Thign v PP* [1984] 1 MLJ 311 heard objections that since the D Attorney General is the public prosecutor and at the same time has supervision and control over the service to which the president and magistrate belonged, they ought to disqualify themselves from hearing the cases. His Lordship applied a similar 'real likelihood of bias' test, and held that a reasonable suspicion of bias is insufficient. His decision was approved E by Salleh Abas LP in *Cheak Yoke Thong v PP* [1984] 2 MLJ 119 (FC).

The Court of Appeal in *Raphael Pura v Insas Bhd & Anor* [2001] 1 MLJ 49 followed its decision in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* and applied the real danger test, that a reasonable and fair-minded person sitting in court and with knowledge of all the facts would have no F basis to suspect that a fair trial would not be possible. The same test was applied by the Singapore Court of Appeal in *Tang Liang Hong v Lee Kuan Yew & Anor and other appeals* [1998] 1 SLR 97.

The real danger of bias test affords us little assistance in this case, where the accused not only has not objected, but also upon being invited to submit upon the objection that he could have raised, has assured the court G repeatedly that he has no objections. Indeed, and to stretch the argument, the fact that if he were disappointed in his trust he could appeal, would diminish the real danger if any.

In *Re Pinochet* the pertinent facts were as follows. Spain sought to extradite Pinochet from Britain for trial in Spain for various alleged war H crimes. He was in Britain for medical treatment and was to return to Chile. Pursuant to international warrants issued by the judicial authorities in Spain, the Metropolitan Stipendiary Magistrates issued two provisional warrants for his arrest. Pinochet applied to quash the warrants. There was an appeal when the first warrant was quashed. The appeal was on the question of whether he could plead immunity from arrest as a former head I of state for acts committed while he was head of state. Before the hearing leave was granted to Amnesty International, two other human rights bodies and three individuals by a committee consisting of Lord Slynn, Lord

Nicholls and Lord Steyn to intervene subject to any protest being made by other parties at the start of the main hearing. In the appeal, Lord Hoffman agreed with the speeches delivered by Lord Nicholls and Lord Steyn, thus constituting the majority holding that Pinochet was not entitled to immunity. Subsequently, it emerged that Lady Hoffman had been working with Amnesty International and Lord Hoffman himself was a Director of the Amnesty International Charitable Trust (AICL). These facts were not disclosed to Pinochet or his legal advisers. It was submitted on behalf of Pinochet that there was a real danger that Lord Hoffman was biased in favour of AI or alternatively (applying the test in *Webb v The Queen*) that such links give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that Lord Hoffman might have been so biased.

Lord Browne-Wilkinson held citing *Shetreet, Judges on Trial* (1976) at p 303; *De Smith, Woolf & Jowel, Judicial Review of Administrative Action* (5th Ed, 1995) at p 525 that the mere fact a judge has an interest is sufficient to disqualify him unless he has made sufficient disclosure. Now, neither Amnesty International nor Amnesty International Charitable Trust had any financial interest in the outcome of that case. The interest was in achieving the trial and possible conviction of Senator Pinochet for crimes against humanity. Having intervened, they had become parties. The case was very unusual. The question was whether in the circumstances of the case, a non-pecuniary interest to achieve a particular result is sufficient to give rise to automatic disqualification and, if so, whether the fact that AICL had such an interest necessarily leads to the conclusion that Lord Hoffman, as a Director of AICL, was automatically disqualified from sitting on the appeal?

On the question that Lord Hoffman did not have a pecuniary interest, his Lordship said:

> … My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation, the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus, in my opinion, if Lord Hoffman had been a member of AI, he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity. Indeed, so much I understood to have been conceded by Mr Duffy.

On the question that Lord Hoffman was not a direct member of Amnesty International, his Lordship held:

> Can it make any difference that, instead of being a direct member of AI, Lord Hoffman is a Director of AICL, that is of a company which is wholly controlled by AI and is carrying on much of its work? Surely not. The

> substance of the matter is that AI, AIL and AICL are all various parts of an entity or movement working in different fields towards the same goals. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart's famous dictum is to be observed: it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.' (see *Rex v Sussex Justices, Ex parte McCarthy* [1924] KB 256 at p 259)

In short, Lord Browne-Wilkinson took the view Lord Hoffman was automatically disqualified, and would set aside the earlier order of the House of Lords hearing where Lord Hoffman participated. He therefore did not find it necessary to consider whether the real danger test was preferable to the reasonable apprehension or suspicion on the part of a fair minded and informed member of the public or otherwise.

Lord Goff agreed with the reasons and result by Lord Browne-Wilkinson for automatic disqualification. He added that the objection was independent of any real bias but it arises simply from Lord Hoffman's involvement in AICL; the close relationship between AI, AIL and AICL, which means that for the purposes of that case, they can be regarded as being, in practical terms, one organization; and the participation of AI in the proceedings in which as a result, it either is, or must be treated as, a party.

Lord Nolan agreed with Lord Browne-Wilkinson and Lord Goff.

Lord Hope agreed, and concluded his speech that Lord Hoffman was in effect a party:

> But everyone whom the prosecutor seeks to bring to justice is entitled to the protection of the law, however grave the offence or offences with which he is being prosecuted. Senator Pinochet is entitled to the judgment of an impartial and independent tribunal on the question which has been raised here as to his immunity. I think that the connections which existed between Lord Hoffman and Amnesty International were of such a character, in view of their duration and proximity, as to disqualify him on this ground. In view of his links with Amnesty International as the chairman and a director of Amnesty International Charity Ltd he could not be seen to be impartial. There has been no suggestion that he was actually biased. He had no financial or pecuniary interest in the outcome. But his relationship with Amnesty International was such that he was, in effect, acting as a judge in his own cause. I consider that his failure to disclose these connections leads inevitably to the conclusion that the decision to which he was a party must be set.

Lord Hutton agreed with Lord Browne-Wilkinson.

The decision in *Re Pinochet* establishes that non-pecuniary interests, such as interests in sharing a common objective by a person, could by its nature and duration, makes it as if he was a party, and applying the principle *nemo judex in sua causa*, that no man may be judge in his own cause, Lord Hoffman ought to have declared his involvement with Amnesty International and disqualified himself. It was a serious objection that

warranted automatic disqualification. That being the finding, it met with the real danger test in *Reg v Gough*, and the wider reasonable apprehension or suspicion on the part of a fair minded and informed member of the public test in *Webb v The Queen* was not necessary to the decision.

Personally, I do not feel there is a real danger of bias on my part. There is no common objective between the head of prosecution and myself, be it arising out of a relationship or any common view with regard to prosecution generally, or the prosecution of the accused in particular, or of any party. I have no reason to believe his action in the prosecution of the accused is personal, or that it is other than in the carrying out of his public duties as the head of the prosecution in an office vested under the Federal Constitution with the responsibility of the conduct of prosecutions. I do not think that from the mere fact of relationship, without more, a fair minded and informed member of the public would think that in all the circumstances in this case there is a real danger of bias on the part of the judge as would meet the test in *Reg v Gough*. The fact of a mere relationship alone cannot be a basis for disqualification, but it must be disclosed and inquired into. On the other hand, that does not stop members of the public from entertaining an apprehension or suspicion of bias, even if unreasonably or even if there is none. Experience teaches us that while time may vindicate us from wrong, unreasonable or untrue accusations, in the short and medium term while it continues, it is equally injurious. That is not to say that the administration of justice must be and is afraid of adverse public comment, but that it should minimize and if possible avoid giving grounds for suspicion, misgivings, skepticism, doubt and mistrust, particularly where it is avoidable in the first place. For this reason, I proceed to consider the wider test and the reasons therefor.

The High Court of Australia in *Webb v The Queen*, having considered *Reg v Gough* and the different tests applied in various jurisdictions, had taken the view that the real danger of bias test was too restricted. It recognized that whilst a court may readily accept that there was no prejudice on the basis of a review of the appeal record, and that a judge is capable of putting aside the fact of his relationship, it may still be unavoidable that an accused or a member of the public with a fair and unprejudiced mind might entertain a reasonable apprehension of bias. It concluded that the appropriate test for protecting the appearance of propriety, which is about public perception rather than a court's view upon a review of the facts, is whether such links gave rise to a reasonable apprehension or suspicion on the part of the fair minded and informed member of the public with knowledge of the material objective facts, that he is biased and that he might not bring an impartial and unprejudiced mind to the resolution of the question in issue. It is the court's view of the public's view, not of the court's own view, of the case or decision in question that is determinative.

The approach is not new. Gibbs CJ had pointed out in *Reg v Simpson; ex p Morrison* (1984) 154 CLR 101 at p 104, that the mere expression of the apprehension of bias does not establish that it is reasonably held; that is a matter which must be determined objectively. The test is whether in all the circumstances the parties or the public might entertain a reasonable

apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him: see *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Reg v Watson; ex p Armstrong* (1976) 136 CLR 248; *Webb v The Queen*.

Scotland has adopted a reasonable suspicion test. *Bradford v McLeod* [1986] SLT 244 adopted the rule as expressed by Eve J in *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276 at p 279 where he said:

> Each member of the council in adjudicating on a complaint thereunder is performing a judicial duty, and he must bring to the discharge of that duty an unbiased and impartial mind. If he has a bias that renders him otherwise than an impartial judge he is disqualified from performing that duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), *if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists*. (Emphasis added.)

In dealing with the question of appearance of impartiality, there is no reason to limit the interest to a pecuniary interest. With respect, the preferable view is that expressed in a later High Court of Australia case, *Ebner v The Official Trustee in Bankruptcy*; *Clenae Pty Ltd v ANZ Banking Group*, where Gleeson CJ, McHugh, Gummow and Hayne JJ had this to say:

> 21 It is not possible to state in a categorical form the circumstances in which a judge, although personally convinced that he or she is not disqualified, may properly decline to sit. Circumstances vary, and may include such factors as the stage at which an objection is raised, the practical possibility of arranging for another judge to hear the case, and the public or constitutional role of the court before which the proceedings are being conducted. These problems usually arise in a context in which a judge has no particular personal desire to hear a case. If a judge were anxious to sit in a particular case, and took pains to arrange that he or she would do so, questions of actual bias may arise.
>
> 22 *The particular principle or principles which determine the grounds upon which a judge will be disqualified from hearing a case follow from a consideration of the fundamental principle that court cases, civil or criminal, must be decided by an independent and impartial tribunal*.
>
> 23 Bias, whether actual or apprehended, connotes the absence of impartiality. It may not be an adequate term to cover all cases of the absence of independence. (Emphasis added.)

The speeches in *Re Pinochet* considered and did not rule out the wider test in *Webb v The Queen*. Indeed in *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor and other appeals* [2000] 1 All ER 65, [2000] 2 WLR 870, the Court of Appeal reviewed most of the Australian cases mentioned and appeared to have adopted a wider meaning to the real danger test including consideration of the real possibility of bias, reminding us that it is the facts of the particular case that must be considered carefully.

This encourages me in suggesting the wider test in Australia, and not closing the categories in this field, but always keeping as a fundamental principle that court cases, civil or criminal, must be decided by an

independent and impartial tribunal, and preserve the administration of justice from any taint of impartiality.

Although on the one hand I have disclosed the relationship upon having notice of his involvement in the papers before me, given the parties an opportunity to submit upon the matter, I am aware of my responsibility to avoid doing my duty to hear the cases before me, and am confident that I can and will give the parties before me a full and fair hearing as well as a decision, given that the learned deputy public prosecutor has informed us that that in view of the nature of this case, the public interest that it raises, particularly in view of the issues involved, and which was touched upon in the opening submission of counsel, the head of prosecution would have active supervision of the conduct of prosecution, and applying the wider test, I conclude that if the objection were taken by the accused, I ought to recuse myself.

The final question I have considered is whether the accused could waive the objection that he could have taken successfully.

As set out in *Sellar v Highland Railway Co*, the objection may be waived in civil cases' issues of apprehension of bias since the parties affected are the parties to the suit only. Indeed in civil cases, the parties are at liberty to settle upon any terms they may desire, since it is essentially the dispute of the parties themselves. If the party that could have apprehension of bias feels he is not at risk, he may waive it.

This case is a criminal trial. In *Dimes v The Proprietors of the Grand Junction Canal* (1852) 3 HL Cas 759, 10 ER 301, it was held that in certain circumstances, such as having an interest, it results in an automatic disqualification. In other words, in such cases, waiver does not arise. The concept of automatic disqualification is not favoured in Australia (*Ebner v The Official Trustee in Bankruptcy*; *Clenae Pty Ltd v ANZ Banking Group*). The book *A selection of Legal Maxims* by Herbert Broom LLD and RH Kersley MA, LLM (10th Ed) quotes Cockburn CJ in *Wakefield Board of Health v West Riding and Grimsby Ry Co* 6 B & S 794 at p 802; 122 ER 1386 for the proposition that 'Nothing is better settled than this, that a party aware of the objection of interest cannot take the chance of a decision in his favour, and afterwards raise the objection.'

In *Re Pinochet* [1999] 2 WLR 272; [1999] 1 All ER 577, Lord Hope of Craighead said:

> As my noble and learned friend Lord Goff of Chieveley said in *Reg v Gough* [1993] AC 646 at p 661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The *disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection*. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice, the application of this rule is so well understood and so consistently observed that no case has arisen in the course

> of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it. (Emphasis added.)

As explained in the above, the disqualification does not follow automatically because the party that could have raised the objection may waive it, and be bound by the waiver.

It may well be that in most cases under the criminal law, it is only the accused who is involved, and arguably it is his prerogative to waive the objection. On the other hand, there are cases where the issues involved are of general public interest, where the legal issues may go beyond the interest of the immediate accused and touch upon questions, for example, of fundamental liberties, principles of criminal law and procedure or general public fascination such as, at times, politics. In such cases, any taint of absence of impartiality or independence would be more intensely felt and the administration of justice must be cognizant of it. In such cases, it would be more prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. In such cases therefore, the courts must exercise its inherent jurisdiction in ensuring justice by not accepting the waiver just as it may exclude evidence otherwise technically admissible (see *Goi Ching Ang v PP* [1999] 1 MLJ 507), in the interest of ensuring justice. This is one such case. Although I am grateful in the vote of confidence in your not having any objections, I will not expend or use up that confidence, for then it will diminish. The greater interest in maintaining and building upon confidence in the impartiality and independence of the judiciary must always take precedence over the pride of a judge and he must recuse himself.

I would therefore recuse myself from hearing the preliminary objections and trial of this case.

Order accordingly.

Reported by Jafisah Jaafar